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No. 87-1701

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1987

RICHARD L. DUGGER,

Petitioner,

v.

CHARLES KENNETH FOSTER,

Respondent.

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

Petitioner will rely upon original statement.

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The Petitioner, Richard L. Dugger, submits for the Court's consideration this reply to certain arguments and statements of facts raised in the Respondent's Brief in Opposition.

OPINIONS BELOW

The Petitioner's original statement is relied upon.

JURISDICTION

The Petitioner's original statement is relied upon.

CONSTITUTIONAL PROVISIONS INVOLVED

The Petitioner's original statement is relied upon.

STATEMENT OF THE CASE

The Petitioner's statement is correct and fully supported by the record. The unprofessional **ad hominem** attacks of Mr. Foster's counsel are unworthy of these proceedings.

REASONS FOR GRANTING THE WRIT

Mr. Foster contends that his petition for habeas corpus relief was a "straightforward **Hitchcock** claim". This is not quite the truth.

Foster presented a claim of error pursuant to **Hitchcock v. Dugger,** 481 U.S. _____, 95 L.Ed.2d 347 (1987), which cited "evidence" which was never presented to the trial court and which was "evidence" that defense counsel (Mr. Mayo) was accused of "failing to produce" in two prior federal §2254 petitions. See **Strickland v. Foster,** 707 F.2d 1339 (11th Cir. 1983), **amended,** 707 F.2d 1352, **cert. denied,** 466 U.S. 993 (1983); **Foster v. Dugger,** 823 F.2d 402 (11th Cir. 1987). Defense counsel was specifically accused of not developing or presenting hospital records and other evidence relating to an alleged "P.T.S.D." illness suffered by Foster. When

certiorari is granted and this Honorable Court can see the actual trial transcripts, Foster's malicious and incorrect statements will become obvious.

Foster, again, sinking beneath professional practice, also attacks counsel for the State by contending that Foster did not prevent counsel from investigating or preparing nonstatutory mitigating evidence. For several years, Foster's lawyers have maintained this position notwithstanding the truth and the express factual determinations of the District and Federal Circuit Courts. We stand by those federal, judicial determinations that Foster **obstructed** counsel and **prevented** the **presentation** of this mitigating evidence. Perhaps over-zealous counsel for Mr. Foster also thinks the Eleventh Circuit "grossly misrepresents" facts.

The Florida Supreme Court is bound by state statute (Sec. 924.33, Fla.Stat.), to conduct "harmless error" review whether or not harmless error has been raised by the parties. This requirement is greater than that of Fed.R.Crim.P. 52(a), because it places an affirmative duty upon the Court to review the "harmless error" issue in every case. When, as here, the Florida Supreme Court shirks its duty simply because the parties did not "brief"[1] it, then the State's detrimental reliance upon

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[1] Although zealously attacking counsel for the State, Foster neglects to mention that the issue was not "briefed" because the Court did not permit briefing. Foster petitioned for "habeas corpus", an original civil action to which the State responded with a superceding motion to dismiss, citing procedural defenses. When the Florida Supreme Court denied the State's motion, it should have allowed us to file an answer and supporting brief. It did not do so.

the statute becomes a violation of the state's right to due process of law.

The sordid history of Foster's collateral attacks, misquoted medical reports, churlish **ad hominem** attacks upon counsel and successive, abusive pleadings has culminated in an unwarranted grant of habeas corpus relief by the new Florida Supreme Court. Relief came, however, at the expense of the decisional law of this Court (and the rights of the people of Florida), through a bizarre overextension of **Hitchcock, supra,** to include evidence which was never presented to a sentencer "but could have been presented".

The vicious nature of Foster's response reveals the fact that we have touched a raw nerve - a nerve exposed because of Foster's reliance upon non-record "evidence" in support of a so-called **Hitchcock** claim.

We are not dealing with "mere error" by

the Florida Supreme Court. We are dealing with a total "perversion of justice", **Curry v. Wilson,** 405 F.2d 110 (9th Cir. 1968), in which **Hitchcock** is being used to permit capital defendants to return to court, decades after trial, and put on "mitigating evidence" which they **elected not to put on** at trial. Only this Court's intervention can afford relief to the public.

CONCLUSION

It is suggested that certiorari should be granted.

Respectfully submitted,

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